

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ORLAN L. UNRUH</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>REX STANLEY FEED YARD, INC.</b>	)	
Respondent	)	Docket No. <b>1,053,222</b>
	)	
AND	)	
	)	
<b>NATIONWIDE AGRIBUSINESS INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the February 24, 2014, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument in Topeka, Kansas, on June 10, 2014.

**APPEARANCES**

Terry J. Malone of Dodge City, Kansas, appeared for claimant. Jeffrey E. King of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the entire record and adopts the stipulations listed in the Award.

**ISSUES**

The ALJ found that as a result of the September 14, 2010, accidental injury, claimant sustained a 24% permanent whole body functional impairment and was awarded permanent partial disability (PPD) benefits based on an 86.1% permanent partial general (work) disability. The work disability percentage was comprised of a 100% wage loss and a 72.2% task loss. The ALJ applied the K.S.A. 2010 Supp. 44-501(h) retirement benefit offset against the Award.

Claimant contends the ALJ erred in applying the retirement benefit offset and in not awarding benefits based on permanent total disability (PTD) pursuant to K.S.A. 2010 Supp. 44-510c(a).

Respondent argues the claim should be disallowed because claimant willfully failed to use a guard or protection (a seat belt) pursuant to K.S.A. 2010 Supp. 44-501(d)(1).

The issues for the Board to decide are:

1. Should the claim be disallowed because claimant wilfully failed to use a guard or protection?
2. What is the nature and extent of claimant's disability?
3. Is respondent entitled to a K.S.A. 2010 Supp. 44-501(h) retirement benefit offset?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

In July 2010, claimant was hired by respondent to drive semi-trucks to haul cow manure. His job duties included loading the truck and delivering the loads.

Clamant testified he experienced difficulty with his truck's brakes the day before the accident, prompting claimant to ask "Ronnie's son," evidently someone associated with respondent, if he knew how to adjust the brakes. According to claimant, Ronnie responded in the affirmative. The following morning, claimant assumed the brakes had been worked on. Claimant described his September 14, 2010, accidental injury as follows:

That was my second load that morning. And when I got to the corner, my brakes wouldn't hold, they failed, and I run through the ditch and into a pasture and sustained a broken back and kind of head injuries.<sup>1</sup>

Claimant testified the truck he was operating when injured had a seat belt, but he was not wearing it when the accident occurred. Claimant further testified respondent did not require him to wear a seat belt. Claimant was, however, aware that the law required him to wear a seatbelt.

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<sup>1</sup> R.H. Trans. at 11.

Claimant was taken to Western Plains Medical Complex in Dodge City, and was thereafter airlifted to Via Christi St. Francis in Wichita. Claimant was found to have sustained multiple injuries as a result of the accident, including a T12 compression fracture. Claimant followed up with Dr. James Weimar, a neurosurgeon, who treated the fracture surgically by kyphoplasty on December 9, 2010. Post-surgically, claimant received physical therapy.

Claimant underwent further treatment from Dr. Alok Shah, an orthopedic surgeon. On April 21, 2011, Dr. Shah performed an arthroscopy of right shoulder with debridement of the glenohumeral joint, subacromial decompression, bursectomy and acromioplasty. On April 3, 2012, Dr. Shah performed a left open carpal tunnel release and a left shoulder arthroscopy with subacromial decompression, acromioplasty and repair of a full-thickness rotator cuff tear.

Claimant has been receiving social security retirement benefits since 1993, when he turned age 65. Claimant testified he “retired in [19]93.”<sup>2</sup> At that time, claimant stopped working as a mail carrier, but he continued to work after 1993. Claimant operated his own business, Town and Country Carpet Cleaners, until 2005. From 2005 until his accident in 2010, claimant worked performing truck driving and associated duties, similar to his work for respondent. In the five year period before the accident, claimant worked for five employers, including respondent.

Claimant was age 84 when he testified at the December 11, 2013, regular hearing. He claimed he experienced low back and right hip pain. In his opinion, he was unable to return to driving a truck because of his physical restrictions. He did not return to work for respondent after the accident.

At the request of claimant’s counsel, Dr. Pedro Murati, a physician board certified in physical medicine and rehabilitation, evaluated claimant on October 10, 2012. The doctor reviewed claimant’s medical records, took a history and performed a physical examination. Dr. Murati diagnosed the following: (1) status post T12 compression fracture; (2) status post kyphoplasty; (3) status post bilateral shoulder surgeries; (4) status post left carpal tunnel release; (5) bilateral ulnar cubital syndrome; (6) myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinal muscles; (7) low back pain with signs of radiculopathy; (8) bilateral SI joint dysfunction; and (10) right trochanteric bursitis. Dr. Murati recommended additional medical treatment for claimant’s ulnar cubital syndrome, myofascial pain syndrome, low back pain and SI joint dysfunction.

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<sup>2</sup> Id. at 15.

Dr. Murati imposed restrictions consisting of:

1. No bending, crouching, stooping, climbing ladders, crawling, heavy grasping (over 40 kg.) bilaterally; no lifting, carrying, pushing, pulling over 20 lbs. with either limb.
2. Rarely climb stairs or squat.
3. No more than occasional sitting, standing, walking, driving, and repetitive grasping/grabbing bilaterally.
4. No frequent repetitive use of hand controls bilaterally; no lifting, carrying, pushing and pulling over 10 lbs. frequently.
5. No work more than 24 inches from the body with either upper extremity.
6. Avoid awkward positions of the neck.
7. Avoid twisting of the trunk.
8. Alternate sitting, standing and walking.
9. No use of hooks, knives, or vibratory tools bilaterally.
10. No keyboarding.

Dr. Murati reviewed the list of claimant's pre-injury work tasks prepared by vocational rehabilitation consultant Karen Terrill and concluded claimant could no longer perform 17 of the 18 tasks for a 94.4% task loss.

Based on the *AMA Guides*,<sup>3</sup> Dr. Murati's aggregate permanent impairment rating of 52% to the body was comprised of the following:

- right ulnar cubital syndrome -- 10% right upper extremity.
- right shoulder status post subacromial decompression -- 10% right upper extremity.
- severe right glenohumeral crepitus -- 18% right upper extremity.
- left ulnar cubital syndrome -- 10% left upper extremity.
- left status post carpal tunnel release -- 10% left upper extremity.
- loss of range of motion in left shoulder -- 16% left upper extremity.
- left shoulder status post subacromial decompression -- 10% left upper extremity.
- right trochanteric bursitis -- 7% right lower extremity.

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<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

- myofascial pain syndrome affecting the cervical paraspinals -- 5% body as a whole.
- T-12 compression fracture -- 5% body as a whole.
- low back pain with signs of radiculopathy -- 10% body as a whole.

In Dr. Murati's opinion, claimant's right upper extremity impairments combined for a 33% to the extremity, which converted to a 20% impairment to the body as a whole. Claimant's left upper extremity impairments combined for a 39% to the extremity, which converted to a 23% impairment to the whole body. Using the Combined Values Chart in the *Guides*, Dr. Murati concluded claimant sustained an overall permanent functional impairment of 52% to the whole person.

Considering claimant's diagnoses and his age, Dr. Murati opined claimant was "realistically and totally disabled."<sup>4</sup> The following exchange occurred at Dr. Murati's deposition:

Q. Okay. And can you tell us, give us your opinion as to why you believe -- first of all, is it your opinion that he is essentially and realistically unemployable?

A. Yes.

Q. All right. And what do you base that opinion on?

A. Again, his medical condition and his age.<sup>5</sup>

Pursuant to an order entered by Judge Fuller, Dr. Paul Stein, a board certified neurosurgeon, evaluated claimant on July 8, 2013. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Stein diagnosed the following: (1) a minor T12 compression fracture, status post kyphoplasty; (2) right shoulder, aggravation of preexisting degenerative disease, status post arthroscopy; (3) left rotator cuff tear, status post arthroscopy; (4) lumbar degenerative disk disease with stenosis; and (5) left carpal tunnel syndrome aggravated by trauma, status post carpal tunnel release surgery.

Dr. Stein imposed permanent restrictions of no repetitive use of the left hand, no prolonged gripping with the left hand, no activity with either hand above shoulder level, no lifting with either hand greater than 20 pounds up to chest level, no lifting greater than 40 pounds occasionally and 30 pounds more often, no repetitive lifting, and no repetitive bending and twisting of the lower back.

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<sup>4</sup> Murati Depo., Ex. 6 at 1.

<sup>5</sup> Murati Depo. at 28.

Dr. Stein opined claimant's T12 compression fracture, left carpal tunnel syndrome, bilateral shoulders and low back injuries were caused or aggravated by claimant's accident.

Based on the *AMA Guides*, Dr. Stein opined claimant sustained a 10% impairment to the left forearm for carpal tunnel syndrome and a 9% impairment to the left upper extremity at the shoulder. Dr. Stein converted these left upper extremity impairments to an 18% of the left upper extremity, which converted to an 11% impairment to the body as a whole. Claimant also sustained a 10% impairment to the upper extremity at the right shoulder, which converted to a 6% body as a whole impairment. Claimant's lower back injury and the T12 compression fracture were each rated by Dr. Stein at 5% to the body. Using the Combined Values Chart, Dr. Stein's aggregate rating is 24% permanent impairment to the body as a whole.

Dr. Stein reviewed the list of claimant's former work tasks prepared by Ms. Terrill and concluded claimant could no longer perform 13 of the 18 tasks for a 72.2% task loss. Dr. Stein testified:

Q. Is there any way for you to determine if any of [claimant's] injuries would have been preventable, had he worn a seat belt?

A. Well, when you say would have been if he was wearing a seat belt with a shoulder strap, there was some reasonable expectation that at least some of the injury might have been prevented.

Q. Would that have been the shoulder, or the back, or which part of his problems might have been prevented?

A. Well, the back. He had a T12 compression fracture. If he had been restrained adequately with a seat belt and a shoulder strap, that might not have occurred because it would probably have been an acute flexion injury and he would not have been thrown forward, he would have been restrained.

I can't tell you about the shoulders. It's possible, but the main area where protection might have come from restrained would have been the compression fracture.<sup>6</sup>

Dr. Stein testified he could not state within reasonable medical certainty that some of claimant's injuries could have been prevented had he worn a seatbelt.

Dr. Stein testified he found no signs of radiculopathy or evidence of neurological deficit. The doctor noted the absence of objective findings documenting an injury to his lumbar spine despite claimant's complaints of low back pain after the accident.

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<sup>6</sup> Stein Depo. at 5-6.

Karen Terrill, a vocational rehabilitation consultant, conducted a telephone interview of claimant on August 15, 2013. Ms. Terrill identified 18 non-duplicated work tasks claimant performed in the 15 years before his accident. Since claimant was not working at the time of the interview, Ms. Terrill found claimant had a 100% wage loss. In Ms. Terrill's opinion claimant is "unable to engage in any type of substantial gainful employment."<sup>7</sup> Ms. Terrill did not testify that claimant had retired before his accidental injury.

### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>8</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>9</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>10</sup>

K.S.A. 2010 Supp. 44-501(d)(1) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

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<sup>7</sup> Terrill Depo. at 13-14.

<sup>8</sup> K.S.A. 44-501(a).

<sup>9</sup> K.S.A. 44-508(g).

<sup>10</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Once the claimant has met his burden of proving a right to compensation, the employer has the burden of proving relief from that liability based upon any statutory defense or exception.<sup>11</sup>

K.S.A. 44-510c(a)(2) (Furse 2000), defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 2000), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts.

In *Wardlow*,<sup>12</sup> the Kansas Court of Appeals held: “The trial court’s finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent.”<sup>13</sup>

K.S.A. Supp 44-501(h) states:

(h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee’s percentage of functional impairment.

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<sup>11</sup> *Messner v. Continental Plastic Containers*, 48 Kan. App. 2d 731, 751, 298 P.3d 371, rev. denied 297 Kan. 1246 (2013), citing *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004).

<sup>12</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

<sup>13</sup> *Id.* at 113.

The purpose of the retirement benefit offset set forth in K.S.A. 44-501(h) is to prevent wage-loss duplication.<sup>14</sup> The Kansas Supreme Court has created an exception to the statute that applies to retired workers who receive social security retirement benefits before reentering the workforce to supplement their social security income.<sup>15</sup>

The statutory exception set forth in *Dickens* is based on the rationale that workers who are already retired and receiving social security retirement benefits before starting work on a part-time job to supplement those benefits suffer a second wage loss when they are injured in the course of their employment.<sup>16</sup> To retire is “to terminate employment or service upon reaching retirement age.”<sup>17</sup>

Based on the holdings of the *McIntosh* and *Dickens* cases, if a claimant is injured before he or she retires, the employer is entitled to the statutory offset, as an injured employee is not entitled to recover both retirement benefits and workers compensation benefits beyond the value of their functional impairment.<sup>18</sup> But if an employee retires and then returns to work to supplement his or her income, the offset does not apply, as the employee’s receipt of both workers compensation benefits and social security retirement benefits is not duplicative.<sup>19</sup>

### **1. Willful Failure To Use Guard Or Protection**

Respondent did not sustain its burden to prove claimant willfully failed to use a guard or protection, a seatbelt, required by statute. Undoubtedly, Kansas law required claimant to wear a seatbelt under these circumstances. Claimant admitted he knew the wearing of seatbelts was legally required. However, to constitute a defense to the claim, claimant’s failure must be “willful.” To be willful within the meaning of K.S.A. 2010 Supp. 44-501(d)(1), claimant’s failure must have included “the element of intractableness, the

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<sup>14</sup> *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 942 P.2d 591 (1997); *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545, rev. denied 278 Kan. 846 (2004).

<sup>15</sup> *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

<sup>16</sup> *Id.* at 1071.

<sup>17</sup> *McIntosh*, 32 Kan. App. 2d at 897, citing *Green v. City of Wichita*, 26 Kan. App. 2d 53, 977 P.2d 283 (1999).

<sup>18</sup> *McIntosh*, 32 Kan. App. 2d at 897-98.

<sup>19</sup> *Dickens*, 266 Kan. at 1071.

headstrong disposition to act by the rule of contradiction.”<sup>20</sup> Respondent presented no evidence that would support a finding of willfulness.

Moreover, the preponderance of the evidence does not support the notion that claimant’s injury resulted from his failure to use the truck’s seatbelt. Dr. Stein testified he could not state within reasonable medical certainty that some of claimant’s injuries could have been prevented had he worn a seatbelt. The injury was as likely caused by the brake failure.

## **2. Retirement Benefit Offset**

Claimant retired before his accidental injury. He reached retirement age when he turned 65 in 1993, at which time he terminated his employment from his job delivering mail. When he retired from delivering mail, his social security retirement benefits commenced. Claimant continued to operate his carpet cleaning business until 2005, when he also retired from that job. In 2005, claimant started working at what he agreed were “odd jobs.”<sup>21</sup> Those odd jobs were truck driving positions. Claimant’s work in 2007-2009 with Jeff Bogner Farms was seasonal in nature.<sup>22</sup>

The Board is persuaded that although claimant continued to work in the open labor market until his accidental injury in 2010, he nevertheless retired from his employment delivering mail in 1993 and he retired from his carpet cleaning business in 2005. From 2005 to 2010, claimant worked at odd jobs, at least one of which was seasonal in nature. It is undisputed the wages claimant received from 1993 to 2010 served to supplement his social security retirement benefits. To retire is “to terminate employment or service upon reaching retirement age.”<sup>23</sup> It is undisputed that claimant retired from his job delivering mail at age 65 and retired from his carpet cleaning job in 2005. While claimant worked after retiring from these jobs, such post-retirement employment does not diminish the fact that claimant retired twice after having reached retirement age. The Board finds claimant need not completely remove himself from the open labor market in order to have retired.

Accordingly, respondent is not entitled to a retirement benefit offset. The Board notes while the Kansas Supreme Court has favored the interpretation of the Kansas

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<sup>20</sup> *Thorn v. Zinc Co.*, 106 Kan. 73, 186 Pac. 972 (1920); *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920); *Carter v. Koch Engineering*, 12 Kan, App. 2d 74, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

<sup>21</sup> R.H. Trans. at 15.

<sup>22</sup> *Id.* at 21.

<sup>23</sup> *McIntosh*, 32 Kan. App. 2d at 897.

Workers Compensation Act through only its plain language,<sup>24</sup> the Supreme Court has recently reiterated the holding in *Dickens*, suggesting *Dickens* is still controlling law.<sup>25</sup> The Board concludes that this claim is controlled by *Dickens* and *McIntosh*.

### 3. Nature And Extent Of Disability

Claimant is permanently totally disabled as a result of his September 14, 2010 accident. He sustained serious injuries in the accident that required multiple surgical procedures. Both Dr. Murati and Dr. Stein imposed stringent physical restrictions resulting in the inability of claimant to perform between 72.2% and 94% of the work tasks he performed in the 15 years preceding the accident. Claimant has been unable to return to work in any capacity since the accident.

Claimant was age 84 when he testified at the regular hearing. He completed only eight years of formal education and he has not obtained a G.E.D. Claimant has no college education and no vocational, technical or on-the-job training. He has no knowledge of computers and he has never typed. His work history consists largely of truck driving and carpet and furniture cleaning.

Claimant's testimony, which is relevant on the issue of the nature and extent of his disability,<sup>26</sup> supports the conclusion that he is permanently totally disabled. The only vocational expert to testify, Karen Terrill, opined claimant was unable to engage in substantial gainful employment, considering claimant's age, education, and the physical restrictions of Drs. Stein and Murati.

The Award is modified to find claimant is entitled to compensation based on permanent total disability.

### CONCLUSIONS OF LAW

1. Respondent did not sustain its burden to prove this claim should be disallowed based on a willful failure by claimant to use a safety or guard required by statute.

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<sup>24</sup> See e.g., *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

<sup>25</sup> See *Robinson v. City of Wichita Employees' Retirement Board of Trustees*, 291 Kan. 266, 286, 241 P.3d 15 (2010); See also *Farley v. Above Par Transportation*, No. 110,507 (Kansas Court of Appeals opinion filed September 5, 2014). (time in which petition for review by Kansas Supreme Court may be filed has not expired). Cf. *Hoesli v. Triplett, Inc.*, 49 Kan. App. 2d 1011, 321 P.3d 18 (2014) (petition for review to Kansas Supreme Court pending).

<sup>26</sup> See *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P. 2d 258 (1999).

2. Respondent is not entitled to a retirement benefit offset pursuant to K.S.A. 2010 Supp. 44- 501(h).

3. Claimant is awarded compensation based on a permanent total disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>27</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, it is the Board's decision that the Award of ALJ Pamela Fuller dated February 24, 2014, is affirmed as modified.

Claimant is entitled to 113 weeks of temporary total disability compensation at the rate of \$376.09, totaling \$42,489.17, followed by permanent total disability compensation at the rate of \$376.09 per week until claimant no longer suffers from permanent total disability or until the \$125,000 statutory cap is reached, whichever event occurs first.

As of September 26, 2014, there is due and owing to claimant 113 weeks of temporary total disability benefits at the weekly rate of \$376.09, totaling \$42,498.17, plus 97.43 weeks of permanent total disability benefits at the rate of \$376.09 per week, or \$36,642.45, for a total due and owing of \$79,140.62, all of which is ordered paid by respondent and carrier in one lump sum, less amounts previously paid. Thereafter, respondent and carrier are ordered to pay claimant permanent total disability benefits at the rate of \$376.09 per week until claimant no longer suffers from permanent total disability or until the \$125,000 statutory cap is reached, whichever event occurs first.

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<sup>27</sup> K.S.A. 2010 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**CONCURRING OPINION**

This Board Member reluctantly concurs. The Board is duty bound to follow binding precedent,<sup>28</sup> including cases such as *Dickens*,<sup>29</sup> where the Kansas Supreme Court ruled that the social security offset did not apply to a worker who retired and then returned to part-time employment to supplement his retirement income, and *McIntosh*.<sup>30</sup> However, the statutory construction employed in such cases diverges from an overriding theme in recent Kansas workers compensation jurisprudence to literally interpret and apply plainly-worded workers compensation statutes.<sup>31</sup> *Bergstrom* states:

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<sup>28</sup> See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P. 2d 807 (1998).

<sup>29</sup> *Dickens v. Pizza Co., Inc.*, 266 Kan. 1066, 974 P.2d 601 (1999).

<sup>30</sup> *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545, *rev. denied* 278 Kan. 846 (2004).

<sup>31</sup> See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); see also *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311 (2013); *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 618, 256 P.3d 828 (2011); *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 152, 285 P.3d 383 (2012); *Messner v. Cont'l Plastic Containers*, 48 Kan. App. 2d 731, 741-42, 298 P.3d 371 (2013), *rev. denied* (Aug. 30, 2013); and *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785.

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).<sup>32</sup>

We also need not resort to legal treatises when a plain reading of a statute reveals legislative intent.<sup>33</sup> The actual text of a statute should not be altered or supplanted by utilizing a treatise such as Larson's Workers' Compensation Law (hereinafter Larson's).<sup>34</sup>

Kansas appellate precedent regarding offsetting workers compensation benefits by social security is not based on reviewing the applicable statute and giving common words their ordinary meaning. Rather, this area of the law is rooted in what our courts believed the legislature intended, as based on a 1974 special committee report, as well as Larson's. The precedent is based on an overt decision to disregard the literal meaning of the words used in the statutes. The precedent is based on trying to prevent "wage-loss duplication" (such language is found nowhere in the Kansas workers compensation statute pertaining to a social security offset) and that wage-loss duplication should not apply to a worker with more than one wage loss (a public policy goal found nowhere in the statute).

When *Dickens* was presented to the Board for decision, the Board noted:

[T]he initial language of K.S.A. 44-501(h) "if the employee is receiving retirement benefits" does not appear to contemplate a rejection of the application of this statute merely because a claimant was receiving benefits prior to an accident. The language "is receiving" indicates the legislature did not make a distinction between benefits received prior to an accident and those begun after an accident occurred. Therefore, the Appeals Board finds the social security benefit offset would apply regardless of whether the social security benefits were being paid prior to an accident or were started after an accident occurred.<sup>35</sup>

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<sup>32</sup> *Bergstrom*, 289 Kan. at 607-08.

<sup>33</sup> See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560, 293 P.3d 723 (2013).

<sup>34</sup> *Id.* at 561.

<sup>35</sup> *Dickens v. Pizza Co.*, No. 216,769, 1998 WL 100141 (Kan. WCAB Feb. 25, 1998).

The Kansas Supreme Court reversed. The Court acknowledged its decision was not based on literal interpretation of K.S.A. 44-501(h):

The fundamental rule of statutory construction is to determine legislative intent whenever possible. *Boyd*, 2 Kan. App. 2d at 428, (citing *State, ex rel., v. City of Overland Park*, 215 Kan. 700, 527 P.2d 1340 [1974] ). *In determining legislative intent, we are not limited to a mere consideration of the language used in the statute.* *Brown v. Keill*, 224 Kan. 195, Syl. ¶ 3, 580 P.2d 867 (1978).

The 1993 amendments were enacted generally to reduce the cost of workers compensation insurance premiums. See Rebein, 62 J.K.B.A. at 30-31. K.S.A.1998 Supp. 44-501(h) in particular was added to prevent duplication of wage-loss benefits. *Franklin*, 262 Kan. at 870. Legislative intent governs construction of a statute *even though the literal meaning of the words used in the statute is not followed.* We hold the Board's interpretation is contrary to the intent of K.S.A.1998 Supp. 44-501(h) [emphasis added].<sup>36</sup>

*Boyd*,<sup>37</sup> the case supporting the holding in *Dickens*, was based on divined legislative intent, not based on the plain wording of the statute.

In *Boyd*, at issue was a statute, K.S.A. 1976 Supp. 44-510f(c), that literally precluded permanent total disability, temporary total disability and permanent partial disability benefits (indemnity benefits) from the time an injured worker received retirement benefits. The claimant, Mr. Boyd, was receiving social security old age benefits, and he intentionally obtained work that did not decrease his receipt of social security benefits. After he was injured, he was denied indemnity benefits. He appealed the ruling.

The Kansas Court of Appeals, in order to avoid potential unconstitutionality of the statute, concluded the legislature must not have intended the statute to apply to people similarly situated as Mr. Boyd. The Court relied not on the plain language of the statute, but on commentary from a legislative committee that the purpose of workers compensation was to replace some portion of wage loss and that there should not be duplication of wage loss provided by another program, such as social security. The Court cited *Baker*<sup>38</sup> and text from Larson's that wage loss protection from various parts of a wage-loss protection system should not be duplicated, even stating that text from Larson's "appears to

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<sup>36</sup> *Dickens v. Pizza Co., Inc.*, 266 Kan. 1066, 1071, 974 P.2d 601, 604 (1999).

<sup>37</sup> *Boyd v. Barton Transfer & Storage*, 2 Kan. App. 2d 425, 580 P.2d 1366, *rev. denied* 225 Kan. 843 (1978).

<sup>38</sup> *Baker v. List and Clark*, 222 Kan. 127, 563 P.2d 431 (1977).

encompass the legislature's intent in enacting K.S.A. 1976 Supp. 44-510f(c)."<sup>39</sup> As later occurred in *Dickens*, the Court noted that it was not limited to mere consideration of statutory language, but instead could look at other factors, such as why the legislation was passed.<sup>40</sup> The Court then reasoned that the legislature could not have intended for Mr. Boyd to suffer two wage losses and not be entitled to indemnity benefits, as based on "spirit and reason, disregarding so far as may be necessary the strict letter of the law."<sup>41</sup>

The *Boyd* holding is not based on strict construction of the statute. It relies on extraneous sources – legislative committee notes and Larson's. Resorting to these outside sources is contrary to interpreting and applying a statute based on what it says.

Like *Dickens*, *McIntosh* was not decided based on literal interpretation of the statute. The cases focus on factors *not* contained within the plain language of K.S.A. 44-501(h), such as:

- whether injury or retirement occurs first; and
- duplication of wage-loss benefits.

Going by what *Dickens*<sup>42</sup> and *McIntosh* instruct us, the Board must follow these sort of considerations that are found nowhere in K.S.A. 44-501(h). However, this Board Member respectfully notes the inconsistency between the *Bergstrom* command to interpret and apply a statute for what it says and the *Dickens* and *McIntosh* approach of interpreting and applying a statute based on factors found nowhere in the statute.

Based on what K.S.A. 44-501(h) literally says, a social security offset would be appropriate in this case. However, I concur out of a duty to follow binding precedent.<sup>43</sup>

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<sup>39</sup> *Boyd*, 2 Kan. App. 2d at 427.

<sup>40</sup> *Id.* at 428.

<sup>41</sup> *Id.* at 428-29.

<sup>42</sup> The Kansas Supreme Court had the opportunity to apply a plain language approach and revisit the *Dickens*' interpretation of K.S.A. 44-501(h), but opted not to do so. See *Robinson v. City of Wichita Retirement Bd. of Trustees*, 291 Kan. 266, 286, 241 P.3d 15 (2010).

<sup>43</sup> The duty to follow binding precedent, despite a literal reading of K.S.A. 44-501(h), is noted in *Hoesli v. Triplett, Inc.*, 49 Kan. App. 2d 1011, 1021-22, 321 P.3d 18 (2014), *pet. for rev. filed* Apr. 3, 2014, and *Farley v. Above Par Transportation*, No. 110,507, 2014 WL 4377071 at \*5 and \*8 (Kansas Court of Appeals unpublished opinion dated Sept. 5, 2014). Given that a petition for review is pending in *Hoesli* and the appeal time in *Farley* has not lapsed, this Board Member is not citing either case as precedent, but rather cites such cases to amplify the discrepancy between literal and non-literal means of construing the legislature's intent.

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